QUESTIONS PRESENTED

1. Whether the Board properly concluded that petitioner violated Section 8(a)(1) and (4) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (4), by filing a civil suit for libel and other alleged injury to its business in order to retaliate against its employees for filing unfair labor practice charges with the Board and for engaging in other activities protected by the Act.

2. Whether the Anti-Injunction Act, 28 U.S.C. 2283, prevents the Board from ordering petitioner to dismiss its civil suit.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2257

BILL JOHNSON'S RESTAURANTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-3 to A-13) [1] is reported at 660 F.2d 1335. The decision and order of the National Labor Relations Board (Pet. App. A-14 to A-57) are reported at 249 N.L.R.B. 155.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1981. A petition for rehearing was denied on March 2, 1982. The petition for writ of certiorari was filed on May 28, 1982, and was granted on October 18,

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari, "J.A." to the Joint Appendix filed in this Court, "Tr." to portions of the transcript of the hearing before the Administrative Law Judge that have not been reproduced in the Joint Appendix, and "GCX" and "RX" to exhibits introduced by the General Counsel and the Respondent (petitioner here), respectively, at that hearing.

1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, are set forth at Pet. App. A-1 to A-2.

STATEMENT

1. a. Petitioner operates a restaurant in Phoenix, Arizona, known as "Bill Johnson's Big Apple East" ("the Restaurant"). On July 25, 1978,[2] Vice President Johnny Johnson, a member of the family that owns the Restaurant, held a meeting of employees to announce a new policy of strict enforcement of company rules. He warned that any waitress who violated his rules would never work again at any of his family's restaurants. Among other things, he added that he would make it "darn hard" for such a waitress to find work at any other restaurant; that the waitresses "didn't really mean anything" and could all be replaced in half an hour, regardless of their seniority; and that he could fire them if he didn't like the earrings they were wearing (Pet. App. A-3, A-22; Tr. 68-71, 160-161, 216, 217, 250-251, 320).

This speech angered and frightened the waitresses, who felt they were being treated "like peons" and that they might be fired at any moment. The waitresses discussed their concerns over the next few days. Several agreed with the suggestion of Ruth Helton, one of the most senior waitresses, that they should get a union to represent them, even though the management of the Restaurant had warned them at various times in the past that they could be fired just for mentioning the word "union." Helton and waitress Carla Scott decided to draw up a list of the waitresses' complaints about their working conditions and to show it to a lawyer acquaintance for advice on what action they could take. Several days after the

[2] All dates hereinafter are in 1978, unless otherwise indicated.

waitresses had begun their discussions, Supervisor Gay telephoned Helton at home and told her that she was discharged. When Helton asked why, Gay said it was because Johnny Johnson had not liked a question she had asked at the July 25 meeting,[3] and also because of her "attitude" (Pet. App. A-4, A-22 to A-23, A-28; Tr. 162, 72-74, 217, 90-91, 320-323, 66-67, 170-172, 286-289, 429-430, 155-156).

On August 9, Helton filed a charge with the National Labor Relations Board alleging that she had been discharged because of her union activity. On September 18, waitresses Nichols, Scott and Michaud walked out of the Restaurant without explanation. When they later returned to fill out tip reports, Manager Sherry Sturgeon, a member of the Johnson family, asked them why they had walked out. The waitresses said they had done so to protest Helton's discharge and the unfair treatment they had been receiving since the meeting. The waitresses did not say that they had quit their jobs, but Sturgeon told them to pick up their checks the following day (Pet. App. A-4 to A-5, A-31 to A-32; Tr. 323-327).

On September 20, the Board's General Counsel issued a complaint alleging that the Restaurant had violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by discharging Helton for her union activities. That same day, Helton and her husband John, waitress Cheryl Nichols and her husband Carl, waitresses Scott and Michaud, and former employee Debra Mackie began picketing the Restaurant. Their signs said that the Restaurant had been accused of unfair labor practices and asked the public to boycott the Restaurant.[4] The pickets walked along the sidewalk

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[3] At the meeting, Helton had asked whether waitresses could sell customers a single pancake, rather than orders of two (Pet. App. A-4, A-24; Tr. 71-72, 162).

[4] Among other things, the picket signs read: Big Apple, small management; Big Apple rotten to its employees; Big Apple unfair to waitresses; Support your local waitresses; Boycott the Big Apple; and Big Apple prejudiced (J.A. 70, 106).

in front of the Restaurant and crossed two driveways leading to its parking lot, but they did not block access to the lot or to the Restaurant. At no time did the pickets number more than seven adults and two children. (Pet. App. A-5, A-32; J.A. 69-72, 112-116, 96, 106-107, 85-86, 4).

Shortly after the picketing began, manager Sturgeon confronted the pickets and took down their names. She said, "[y]ou might think you're funny, but I intend to have the last laugh. I will get even with you for what you're doing." She also said, "[y]ou're going to all pay for this," and she told Helton, "Ruth[,] I'll get even with you if it's the last thing I do." That afternoon, petitioner's President, Gene Johnson, telephoned waitress Nichols and asked to speak to her husband. Johnson asked Carl Nichols why he and his wife had been picketing the Restaurant. When Nichols said that they were protesting Helton's discharge, Johnson said that she would hate to see them lose the new home they had bought, and, twice during the conversation, stated that she would hate to see them "get hurt by all of this" (Pet. App. A-5, A-32 to A-34; J.A. 70-71, 82-84, 102-103, 87-90).

Picketing continued on Thursday and Friday, September 21 and 22. On September 22, the pickets distributed a leaflet that stated (Pet. App. A-5 to A-6, A-34 to A-35; J.A. 2):

> THE [NLRB] HAS ISSUED A COMPLAINT AGAINST THE BIG APPLE RESTAURANT * * * FOR UNFAIR LABOR PRACTICES.
>
> The complaint was issued as a result of charges filed by Myrland Helton, a former employee who was fired August 8 after suggesting to other waitresses they should organize a union. Mrs. Helton has been an employee of the Big Apple seven and one half years.
>
> Several other waitresses have quit their jobs to join Mrs. Helton in picketing the restaurant to inform the public of the dispute between the employees and the

restaurant's management. Among the waitresses' complaints are the following:

- Eight hour shifts with no specified breaks.
- No pay for overtime when waitresses were required to remain at their posts until their last customer's check had been paid.
- Waitresses threatened with dismissal if they lost any time due to illness over the Christmas holiday season.
- Inconsistent management practices.
- Unwarranted sexual advances.
- A filthy restroom for women employees, with no soap, paper towels or toilet tissue provided.

EMPLOYEES OF BILL JOHNSON'S BIG APPLE FOR JUSTICE ON THE JOB.

b. On Monday, September 25, petitioner filed a civil complaint in state court against Helton and the other pickets. The complaint (J.A. 3-9) alleged that Helton and the others had engaged in mass picketing, harassed customers, blocked public access to the Restaurant, made statements indicative of a strike and boycott when in fact no such strike or boycott was in progress, and created a threat to public safety. The complaint also alleged that the pickets had distributed a leaflet containing "false and outrageous statements, including misrepresentations of proceedings pending before the [NLRB] and accusations that the Restaurant's waitresses had complained about 'unwarranted sexual advances' and about 'a filthy restroom for women employees * * * '" (*id.* at 4). The complaint sought actual damages, $500,000 in punitive damages, and an order enjoining the pickets from trespassing, mass picketing, violence, interfering with the Restaurant's business operations, and publishing false and misleading statements about the Restaurant and its management. At the time petitioner filed the complaint it also sought a temporary restraining order and filed a motion

to shorten the time for taking depositions (*id.* at 10-19). The depositions of Helton and her husband were set for September 27, and those of the other defendants for September 29 (Pet. App. A-6, A-35 to A-36).

A hearing on petitioner's motion for a temporary restraining order was scheduled for noon on September 25. About an hour before the hearing, Helton received a telephone call from fellow waitress Scott saying that she had just been called by Lawrence Katz, the Restaurant's attorney, and that she had to go to court at noon. Scott told Helton the matter involved "a TR something, [but] she didn't really know what it was and she didn't really know what was going on." A few minutes later, Katz called Helton, told her that a hearing was scheduled for noon, and read her the names of the other defendants in the suit, whom she recognized as those who had picketed in her support. She told Katz that he "shouldn't be scaring those girls like that," to which Katz responded, "[a]ren't you?" (Pet. App. A-36; J.A. 73-85, 80).

Only three of the pickets attended the hearing on petitioner's motion for a temporary restraining order. None of the three was represented by counsel. The court issued an order granting most of the relief requested, but refused to enjoin either the distribution of leaflets or picketing by small groups. The court set a hearing on the request for preliminary injunction for October 5 (Pet. App. A-6, A-36; J.A. 94-95, 54, 19-22).

On October 2, petitioner's attorneys began deposing Helton and the other defendants. They asked numerous questions regarding the nature and extent of Helton's union activities, the identities of other employees involved in such activities, and the extent of knowledge by supervisors of these activities.[5] Petitioner's attorneys sought

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[5] The employees' attorney had filed a motion to preclude discovery of matters relevant to the pending unfair labor practice proceeding until after the Board hearing, since the Board's rules generally do not permit discovery. The state court ruled that, while petitioner's attorneys could not inquire into statements made to the

to discover evidence possessed by the defendants concerning petitioner's antiunion animus and information about defendants' compliance with various Restaurant rules (Pet. App. A-36 to A-37; J.A. 58-60; GCX 3(a) through 3(h)).

On the evening after Helton was deposed, petitioner's general manager Don Kalfus called former waitress Sandra Lambertus and said that Helton had mentioned Lambertus' name several times during her deposition and that he wanted to ask Lambertus some "honest questions" (Pet. App. A-38; Tr. 435, 453-454, 461). He said he knew the Restaurant needed to be "better organized" and that Helton had gotten a "bad deal" (Pet. App. A-38; Tr. 435-436, 461-462). He then asked whether Supervisor Gay was aware that the waitresses were trying to organize a union (Pet. App. A-38; Tr. 436, 454-455). Lambertus responded that Gay was aware, to which Kalfus responded, "[o]h, no," and said that he had been hoping she would tell him something different (Pet. App. A-38; Tr. 436, 454-455).

Meanwhile, on September 30, Helton had filed a second charge with the Board alleging that petitioner had filed its state court suit in retaliation for the defendants' protected, concerted activities, and because they had filed charges under the Act. On October 23, the General Counsel issued a complaint based on this charge, alleging that petitioner's lawsuit violated Section 8(a)(1) and (4) of the Act, 29 U.S.C. 158(a)(1) and (4).[6] An administrative law judge ("ALJ") consolidated the hearing on

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Board's investigators, they could inquire as to "statements made publicly in Maricopa County, and the basis for those statements" (Pet. App. A-6, A-36 to A-37; J.A. 55-58, 22-31, 32-40).

[6] On October 27, the Board's Regional Director petitioned a federal district court, pursuant to Section 10(j) of the Act, 29 U.S.C. 160(j), for an order enjoining petitioner from maintaining its state court suit pending a final Board decision. The district court denied the Regional Director's request on November 1 (Pet. Br. App. C1 to C7). On November 13, the defendants in the state court suit filed countersuits against petitioner, alleging abuse of process, malicious

this complaint with the hearing on the unfair labor practice charges already pending.

2. The Board adopted the decision of the administrative law judge, concluding that petitioner had violated Section 8(a)(1) and (3) of the Act by discharging Helton because of her union activities, and that it had violated Section 8(a)(1) of the Act by threatening the pickets with reprisals (Pet. App. A-14 to A-57). The Board also found that petitioner had violated Section 8(a)(1) and (4) of the Act by initiating the lawsuit in order to punish Helton for filing the unfair labor practice charges, to punish Helton and the others for picketing the Restaurant, to discourage them from engaging in other protected, concerted activity, and to interfere with the pending Board proceeding (Pet. App. A-42, A-51 to A-52). Finally, the Board found that petitioner had violated Section 8(a)(1) and (4) of the Act by deposing the defendants, under circumstances the Board found to be coercive, concerning the subject matter of the pending unfair labor practice proceeding, for the purpose of circumventing the Board's discovery rules and gaining access to the General Counsel's case (Pet. App. A-14 to A-15, A-29, A-32 to A-52). The Board also found that petitioner had violated Section 8(a)(1) and (4) of the Act when its general manager questioned former employee Lambertus about a supervisor's knowledge of employee union activities (Pet. App. A-29 to A-30, A-38, A-51 to A-52).[7]

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prosecution and libel. On March 15, 1979, the state court dismissed the counterclaim alleging abuse of process, granted the defendants' motion for summary judgment as to the business interference claim, and left the business disparagement (libel) count for trial (Pet. Br. App. D1).

[7] In addition, the Board found that petitioner had violated Section 8(a)(1) of the Act when, after Helton's discharge, a member of management twice asked a hostess whether Helton was having "any contact with any of the girls" and whether any of the other waitresses were talking about the union (Pet. App. A-29 to A-30, A-51).

In finding that petitioner's motive in filing the lawsuit was retaliatory, the ALJ relied on manager Sturgeon's threats to get even with Helton and the pickets and President Gene Johnson's threats to Carl and Cheryl Nichols that as a result of the picketing they might lose their new home or "get hurt by all this" (Pet. App. A-42). The ALJ also concluded that petitioner lacked a "reasonable basis" for filing the suit (*id.* at A-40). He found no basis for the allegations of the complaint that the pickets had blocked the sidewalk or harassed petitioner's customers and employees,[8] and he termed "pure folly" the allegation that the picket signs declared a boycott when no boycott was in progress[9] (*id.* at A-40 to A-41). The ALJ similarly found no basis for the allegations that the leaflet contained false, outrageous or malicious statements; he found that the leaflet contained no misrepresentations concerning the Board's proceedings, and that the record evidence in fact "establish[ed] the truthfulness of all six 'waitresses' complaints' listed in the leaflet"[10] (*id.* at A-41). The ALJ concluded (*id.* at A-42):

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[8] Vice President Rudy Johnson, who was petitioner's observer during the picketing, admitted on cross examination that the pickets did not block access to the Restaurant (J.A. 113-116). The record contains no evidence of harassment of customers or employees.

[9] The state court complaint alleged that the pickets carried signs and made statements indicative of a strike and boycott "although no such boycott or strike was in progress" (Pet. App. A-40). In fact, the signs and leaflet made no mention of a strike, although several of the waitresses considered themselves on strike, and Vice President Rudy Johnson had heard one of them say so (J.A. 116). The picket signs specifically requested the public to boycott the Restaurant (J.A. 70, 106).

[10] The state court complaint alleged that the leaflet contained "misrepresentations of proceedings pending before the [NLRB]" and that it falsely stated that "waitresses had complained about 'unwarranted sexual advances' and about 'a filthy restroom for women employees * * *'" (Pet. App. A-40). The leaflet stated that a Board complaint had issued accusing the Restaurant of unfair labor

> [Petitioner's] lawsuit placed its employees on notice that if an employee files charges with the Board, or makes public a dispute with [petitioner], that employee is subjecting himself to the possibility of a lawsuit which will require immediate expense by having to hire private legal counsel to defend against the lawsuit and face the possibility of having to reimburse [petitioner] for legal fees and damages if the state court upholds [petitioner's] claim. Even if [petitioner's] lawsuit is dismissed by the state court, Helton and the other picketers will have been required to pay legal fees as a direct consequence of her having filed a charge with the Board.

The Board ordered petitioner, inter alia, to reinstate Helton with backpay, to reinstate the three striking waitresses,[11] to withdraw the civil suit, and to reimburse

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practices; that the complaint was the result of a charge filed by Helton; and that Helton had been discharged after suggesting to other waitresses that they should organize a union. The ALJ found that Helton was, in fact, discharged because of her union activity. The unrefuted evidence showed that the waitresses were the object of sexual advances by both Vice President Johnny Johnson and General Manager Don Kalfus—advances that were not limited to oral solicitations, but included unwanted hugging, kissing, and similar physical contacts, and that in one case involved a lewd proposition made by Vice President Johnson inside the women's restroom, where he apparently had been waiting for a waitress to enter. The evidence also established that an unused shower stall in the women's restroom served as a storage area for the brooms, rakes, and sawdust bags used to spread sawdust on the Restaurant floor; that the bags were sometimes lying on the floor, so that the women had to step over them to use the facilities; that the bags were often wet, since the unused shower continually dripped, and that the sawdust had clogged up the drain, so that "stagnated" water had collected in the stall; that there were no trash cans provided, so that paper towels were usually thrown on the floor; and that there were frequently no towels, no soap, and no toilet paper (Pet. App. A-10 to A-11, A-40 to A-42; J.A. 2, 4, 148-151, 140-143, 125-126, 128-130, 131-133; Tr. 456-457; J.A. 154-156, 138-140, 117-118).

[11] Although the Board upheld the ALJ's finding that the waitresses were not discharged, it concluded that they were entitled to reinstatement as unfair labor practice strikers (Pet. App. A-14 n.2).

Helton and the other defendants in that suit for the legal expenses they incurred[12] (Pet. App. A-14 to A-15, A-42 to A-55).

3. The court of appeals affirmed the Board's decision and enforced its order (Pet. App. A-3 to A-13). The court of appeals agreed with the Board that filing of a civil suit against an employee in bad faith in furtherance of an unlawful objective can be an unfair labor practice (*id.* at A-9 to A-10, citing *United Credit Bureau of America, Inc.* v. *NLRB*, 643 F.2d 1017, 1023 (4th Cir.), cert. denied, 454 U.S. 994 (1981), and *Power Systems, Inc.* v. *NLRB*, 601 F.2d 936, 939 (7th Cir. 1979)). The court of appeals found "substantial evidence in the record to support the Board's findings that the restaurant's lawsuit lacked a reasonable basis in fact, and that it was filed to penalize Helton for filing charges with the Board and to penalize the picketers for engaging in protected activity" (Pet. App. A-10).

The court of appeals noted petitioner's failure to produce any evidence that would demonstrate that its complaint had a reasonable basis in fact (Pet. App. A-10 to A-11):

> The restaurant produced no evidence to support its suit to enjoin the picketing. The allegations of mass picketing, trespass, and the resultant blocking of restaurant entrances and danger to the public were totally unsubstantiated * * *. The mass picketing alleged in the complaint never materialized * * *.
>
> The restaurant also lacked a reasonable basis in fact for its libel suit. To prove libel in the context of a labor dispute, an employer must prove that the employees made false, defamatory statements, and that the statements were made with "actual malice"

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[12] Petitioner's request for a preliminary injunction was denied on November 16 (J.A. 52). The suit for a permanent injunction and for damages was still pending at the time of the Board's decision (Pet. App. A-6, A-37 to A-38).

> * * *. [T]he restaurant produced no evidence to show that the picketers made the statements with reckless disregard for the truth or falsity of the statements.

The court of appeals also relied on management's threats to Helton and the pickets, including Manager Sturgeon's promise to "get even with you if it's the last thing I do" and President Gene Johnson's veiled threat to a picket that she would hate to see him and his wife "get hurt by all of this;" the timing of the lawsuit which was filed just five days after those threats; and petitioner's immediate use of the civil suit to depose Helton about the identities of other pro-union employees (*id.* at A-11).[13]

The court of appeals rejected petitioner's contention (Pet. App. A-11) that "its lawsuit had a reasonable basis because the complaint on its face was subject to state court jurisdiction." The court stated that "[m]ore than a carefully drawn complaint is required to avoid a finding that a lawsuit lacks a reasonable basis." The court of appeals also rejected petitioner's assertion that the Board could not order the employer to withdraw the state court action, stating (*id.* at A-12):

> Since the Board properly found that the filing of the state court action was an unfair labor practice, it follows that the Board can order the employer to cease and desist from that practice. The federal anti-injunction statute, 28 U.S.C. 2283, does not prevent the Board from curbing state court action that interferes with the Board's exercise of its own jurisdiction.

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[13] The court of appeals noted that Helton's deposition "almost certainly had a chilling effect on Helton and the other picketers. It also tended to interfere with the Board's administration of federal labor policy by allowing the restaurant to circumvent the restrictive discovery rules which apply to unfair labor practice hearings" (Pet. App. A-11 to A-12 n.2).

SUMMARY OF ARGUMENT

1. Section 8(a)(1) and (4) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (4), generally prohibits employer conduct that is intended to, or that has the likely effect of, restraining employees in the exercise of rights protected under the Act, including the right to file charges with the Board. When an employer files a civil suit against its employees in the context of a labor dispute, such a suit may well restrain employees in the exercise of their rights under the Act. Although the Board has moved carefully in this area of the law, because of concern for the right of persons to litigate their claims in court, it has concluded properly that an employer's filing of a suit may constitute an unfair labor practice if the suit is intended to retaliate against employees for engaging in protected activity. The questions presented by petitioner for review do not include a challenge to the Board's finding, upheld by the court of appeals, that it filed a civil suit against its employees for the purpose of retaliating for their protected conduct. The Board properly concluded that filing of that suit constitutes an unfair labor practice.

a. The general rule followed by the Board is that an employer or a union that brings a civil suit against employees does not commit an unfair labor practice, even when the suit seeks to enjoin employees from exercising a protected right. However, both the Board and the courts of appeals have recognized an exception to this general rule in cases in which a suit is not filed in good faith to enforce a colorable claim, but is intended to retaliate against employees for exercising rights protected under the Act and to discourage the future exercise of such rights. The exception applies in cases in which an employer or union files a suit against an employee without a reasonable basis in fact in retaliation for the employee's resort to the Board's process.

b. The Board's policy reflects a proper balancing of the interests relevant to filing of a civil suit in the con-

text of a labor dispute. While any such suit may operate to discourage employees from exercising their rights under the Act, a suit filed in retaliation for the exercise of rights is particularly likely to do so. When the employer requests sizeable monetary damages and immediate injunctive relief, the employees who are sued must hire counsel immediately and spend time defending the case. Other employees are made aware that they, too, can expect to be sued if they choose to engage in protected activity. Allowing the suit to proceed in state court does not adequately protect rights under the Act. Although an employee-defendant may prevail eventually on the merits of the suit, the monetary cost may be high, and there may be substantial deterrence of protected activity in the interim. In addition, the ability of the Board to seek preliminary relief from a federal district court after an unfair labor practice charge has been filed, see 29 U.S.C. 160(j), does not adequately protect the exercise of rights guaranteed by the Act in the case of a retaliatory suit.

On the other hand, the interests of the plaintiff and the states in state court adjudication of causes of action arising under state law are minimal in the case of retaliatory suits. Such interests may be strong when a suit is brought in good faith. However, the retaliatory suit is brought not to obtain vindication of a right protected by state law, but to retaliate against employees for their exercise of federally protected rights. There is little reason for deference to state courts in such a case. Moreover, the need for protection from the filing of an insubstantial state claim for the purpose of retaliation for federally protected conduct is independent from state concern for protecting its citizens and judicial system from abuse of process—and requires the application of different standards.

The Board's policy is analogous to principles that courts have developed in other areas of the law. Under Section 1 of the Sherman Act, 15 U.S.C. 1, the general rule is that agreement to initiate and prosecute administrative or judicial proceedings is not a violation of the

antitrust laws, even if the proceedings may result in an anticompetitive effect. However, a court may find an antitrust violation in the case of an agreement to pursue "sham" litigation, in which the purpose of initiating the proceedings is not to obtain an available remedy, but merely to harass a competitor. See *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). Another analogy is the exception to the general prohibition on federal interference in state court proceedings brought by state officials when such proceedings have been brought in bad faith or for the purpose of discouraging protected activities. See *Dombrowski* v. *Pfister*, 380 U.S. 479, 490 (1965). The common law tort of abuse of process, which includes misuse of a process for an end other than that for which it was designed, provides a further analogy.

c. The Board in this case properly found that petitioner brought its suit in order to retaliate against its employees for their protected activity, including their resort to the Board's processes, and thereby committed an unfair labor practice. The Board relied on various statements by representatives of petitioner that indicated that the suit was filed for the purpose of retaliation against employees for engaging in protected activity. The Board also relied on the timing of the suit and the questions asked at the depositions. In addition, the Board found that petitioner had not shown any reasonable basis in fact for the filing of its suit, since it produced no evidence that would have supported any of its state court allegations. The Board did not attempt to rule on the merits of the state court suit, but merely afforded petitioner an opportunity to demonstrate that it had some colorable claim on which to base the suit.

d. Petitioner cites several cases in which this Court concluded that particular state causes of action are not preempted by the federal labor laws. These cases, including *Linn* v. *United Plant Guard Workers, Local 114*,

383 U.S. 53 (1966), and *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), are inapposite. The Board's finding of an unfair labor practice in this case is not affected by whether or not the cause of action alleged in the state court complaint was preempted. The Board did not attempt to adjudicate the merits of the state court suit; rather, it addressed the very different question whether the filing of the suit itself constituted an unfair labor practice because it was designed to retaliate against employees for engaging in protected activity. Thus, the question of preemption is irrelevant.

2. Section 2283 (28 U.S.C.), which prohibits federal courts from granting injunctions to stay state court proceedings except in certain circumstances, does not preclude the Board from ordering petitioner to dismiss its civil action. That statute does not apply to the enforcement by federal agencies of federal rights, and thus does not bar the Board from ordering a remedy for the unfair labor practice it found in this case. See *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138 (1971).

ARGUMENT

I. THE BOARD PROPERLY CONCLUDED THAT PETITIONER VIOLATED THE NATIONAL LABOR RELATIONS ACT WHEN IT BROUGHT A CIVIL SUIT IN ORDER TO RETALIATE AGAINST ITS EMPLOYEES FOR FILING UNFAIR LABOR PRACTICE CHARGES WITH THE BOARD AND FOR ENGAGING IN OTHER ACTIVITIES PROTECTED BY THE ACT

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157.[14] Section 8(a)(4)

[14] A similar provision makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of Section 7

of the Act, 29 U.S.C. 158(a)(4), makes it an unfair labor practice for an employer to discharge or otherwise discriminate against employees who have filed charges with the Board. These provisions generally prohibit any employer conduct that is intended to restrain, or that has the likely effect of restraining, employees in the exercise of their right to engage in union or other concerted activity for mutual aid and protection, including the right to file charges with the Board to obtain redress for such restraints. See *NLRB* v. *Scrivener*, 405 U.S. 117, 121-125 (1972); *NLRB* v. *Exchange Parts Co.*, 375 U.S. 405, 409 (1964); see also *NLRB* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 422 (1968) (explaining Section 8(b)(1)(A) of the Act, 29 U.S.C. 158 (b)(1)(A), a parallel provision applicable to restraints by unions). The courts have recognized that a wide range of employer conduct can constitute a violation of Section 8(a)(1) and (4). See, e.g., *NLRB* v. *Scrivener*, *supra* (discharge for providing information to Board investigator); *NLRB* v. *Exchange Parts Co.*, *supra* (grant of employee benefits designed to discourage vote for union); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617-619 (1969) (prediction of economic harm as result of unionization not based on objective facts); *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945) (company rule forbidding employee union solicitation on company property during non-working time); *NLRB* v. *Taber Instruments*, 421 F.2d 642, 643-644 (2d Cir. 1970) (threat of retaliation for engaging in union activity); *Ridgewood Management Co.* v. *NLRB*, 410 F.2d 738, 740 (5th Cir.), cert. denied, 396 U.S. 832 (1969) (coercive interrogation concerning organizational activity).

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rights. See Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A). Section 7 provides, inter alia, that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *."

The filing of a civil suit by an employer against its employees in the context of a labor dispute clearly has the potential for interfering with the employees' exercise of protected rights, including the right to file charges with the Board. Filing of such a suit normally requires the employee-defendants to expend time and money immediately in order to defend the suit, and may expose them to high potential monetary liability. Thus, the suit is likely to create considerable pressure on the employee-defendants to cease the challenged activity, even though it is protected by the Act. Moreover, filing of a suit may well discourage protected activity by other employees, who have been put on notice that they risk a similar suit. If an employer files a civil suit in response to an employee's filing of unfair labor practice charges with the Board, employees could be discouraged from invoking the Board's process or cooperating with Board investigations.

Despite the considerable potential for interference with protected activity in violation of the provisions of the Act, the Board has moved with considerable caution in evaluating civil suits filed in the context of a labor dispute. The Board has recognized, as did the court below (Pet. App. A-13), that such cases "involve[] a delicate balance between federal and state interests as well as between individual rights of organization and litigation." As the court below noted (*ibid.*), "[t]he Board has demonstrated its sensitivity to these issues by its sparing enforcement of limitations on the right to bring suit in state court." The Board has held correctly that a narrow class of suits against employees—those brought in bad faith, for the purpose of retaliation for exercise of protected rights—may constitute the basis for a finding that an employer or union has committed an unfair labor practice.

The questions presented by petitioner for review do not include a challenge to the Board's finding, upheld by the court of appeals, that it filed a civil suit against its employees for the purpose of retaliating for their protected conduct. The Board properly concluded that filing of that suit constitutes an unfair labor practice.

A. The Board Has Concluded That Filing of a Civil Suit Normally Will Not Violate the Act, but Has Recognized an Exception for Cases in Which a Suit Is Brought in Order to Retaliate Against Employees for Engaging in Activities Protected by the Act

The court of appeals correctly stated (Pet. App. A-9) that "it is not an unfair labor practice for an employer to file and prosecute a civil lawsuit against an employee, so long as the suit is filed in good faith and not in furtherance of an unlawful objective." In *Clyde Taylor Co.*, 127 N.L.R.B. 103, 109 (1960), the Board articulated its basic policy of "accommodat[ing] its enforcement of the Act to the right of all persons to litigate their claims in court, rather than condemn[ing] the exercise of such right as an unfair labor practice." The Board held in *Clyde Taylor* that the employer had not violated the Act by obtaining a state court injunction banning peaceful picketing, even though such picketing was protected by Section 7 of the Act, 29 U.S.C. 157.[15] As the Board subsequently explained, "going to a judicial body for redress of alleged wrongs * * * stands apart from other forms of action directed at the alleged wrongdoer. The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right." *Peddie Buildings*, 203 N.L.R.B. 265, 272 (1973), enforcement denied on other grounds, 498 F.2d 43 (3d Cir. 1974) (trespass action against employee pickets). Moreover, "[t]he presumption * * * is that the court can be relied upon to give due effect to the con-

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[15] The Board did find that the employer's *threat* to sue for libel employees who filed unfair labor practice charges violated the Act. The Board stated (127 N.L.R.B. at 108): "Such a threat * * * is of a harassing nature. It would normally tend to intimidate an individual contemplating filing a charge, from doing so, or one, who has filed a charge, to withdraw it." See also *S.E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977) (threat to sue for slander employee who claimed supervisor made anti-union statement violated the Act, but slander suit itself was not a violation).

trolling law." *Smith Steel Workers*, 174 N.L.R.B. 235, 241 (1969), enforced in relevant part, 420 F.2d 1, 9 (7th Cir. 1969) (suit to compel arbitration).[16] See also *Associated General Contractors* v. *NLRB*, 637 F.2d 556, 560-562 (8th Cir. 1980) (employer's suit against union to enforce contract).

However, both the Board and the courts of appeals have recognized an exception to the general rule in cases in which a suit was not filed "in good faith to enforce a colorable * * * [claim] and was * * * the kind of tactic calculated to restrain employees or employers in the exercise of rights guaranteed by the Act." *Retail Clerks Union Local 770*, 218 N.L.R.B. 680, 683 (1975). Thus, in *International Organization of Masters, Mates and Pilots*, 224 N.L.R.B. 1626, 1634 (1976), aff'd, 575 F.2d 896, 906-907 (D.C. Cir. 1978), the Board held that a union had violated Section 8(b)(4) and (1)(B) of the Act, 29 U.S.C. 158(b)(4) and (1)(B), by filing an in rem action against a vessel, thereby requiring the vessel's owners to obtain security in the amount of $100,000 to secure the vessel's release. The Board rejected the union's assertion "that the Board may not displace 'the ancient and traditional rights' of the former officers of the vessel in filing 'a maritime lien against his vessel for both

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[16] See also *American Federation of State, County & Municipal Employees*, 262 N.L.R.B. No. 121 (July 15, 1982), slip op. JD 6 n.10 (suit to enforce strike settlement agreement); *Airport Limousine Service, Inc.*, 231 N.L.R.B. 932, 935 (1977) (bankruptcy petition to reject collective agreement); *S.E. Nichols Marcy Corp., supra; Local 259, United Automobile Workers*, 221 N.L.R.B. 656, 661 (1975) (suit to enforce arbitration award); *Retail Clerks Union Local 770*, 218 N.L.R.B. 680, 683 (1975) (suit to enforce arbitration award); *Los Angeles Building & Construction Trades Council*, 217 N.L.R.B. 946, 948 (1975) (damage suit for breach of contract); *DC International, Inc.*, 162 N.L.R.B. 1383, 1394, enforcement denied in part on other grounds, 385 F.2d 215 (8th Cir. 1967) (trespass action against discharged employee); *Fashion Fair, Inc.*, 159 N.L.R.B. 1435, 1449 (1966) (state court injunction against peaceful picketing); *American Bakery & Confectionery Workers*, 128 N.L.R.B. 937, 938 (1960) (union suit to enjoin continued employment of disfavored employee).

earned and unearned wages'" (224 N.L.R.B. at 1634). The Board found that the suit was not brought for the purpose alleged by the union but rather was brought with the unlawful objective of compelling the vessel to employ officers represented by it rather than those represented by another union (*id.* at 1634-1635). The Board added (*id.* at 1626 n.2) that, since the "reason offered by the [union] for its action was 'an afterthought, constituting a stratagem to mask [its] real intent' the filing of the lawsuit may not have been taken in complete good faith." The court of appeals upheld the Board's decision, stating (575 F.2d at 907) that, since "the lawsuit was coupled with a lien, and was intimately related to ongoing picketing for an unlawful objective and 'may not have been taken in complete good faith,' we can see no inconsistency between *Clyde Taylor Co.* (and its progeny) and the Board's determination in this instance" (citation omitted).[17]

The Board, again with the approval of the courts of appeals, has held that the general *Clyde Taylor* rule does not apply in cases in which an employer or a union files suit against an employee without any reasonable basis, in retaliation for the employee's resort to the Board's processes. See *Power Systems, Inc.*, 239 N.L.R.B. 445 (1978), enforcement denied, 601 F.2d 936 (7th Cir. 1979); *United Credit Bureau of America, Inc.*, 242 N.L.R.B. 921, 925-926 (1979), enforced, 643 F.2d 1017, 1022-1024 (4th Cir.), cert. denied, 454 U.S. 994 (1981); *George A. Angle*, 242 N.L.R.B. 744, 748 (1980), enforced, 683 F.2d 1296 (10th Cir. 1982); *Sheet Metal Workers' Union Local 355*, 254 N.L.R.B. 773, 778-780 (1981).

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[17] See also *Bergman* v. *NLRB*, 577 F.2d 100, 103-104 (9th Cir. 1978) (union's suit against employer to enforce contract permitted where there was "no suggestion * * * that the union's action approaches malicious prosecution or abuse of process"); *Lodges 743 and 1746, International Association of Machinists & Aerospace Workers* v. *United Aircraft Corp.*, 534 F.2d 422, 464-465 (2d Cir. 1975), cert. denied, 429 U.S. 825 (1976) (damage suit for violence by strikers; upholding application of *Clyde Taylor* rule in case in which facts did not show improper motivation or abuse of process).

Thus, in *Power Systems*, the employer filed a state court damage action alleging that a discharged employee had filed charges with the Board contesting his discharge, "without probable cause and for the purpose of harassing" the employer (239 N.L.R.B. at 446). The Board found that the employer "had no reasonable basis for filing the lawsuit" but "had as its purpose the unlawful objective of penalizing [the employee] for filing a charge with the Board, and thus depriving him of, and discouraging employees from seeking access to the Board's processes" (*id.* at 450). The Board explained (*id.* at 449) (footnote omitted):

> [The employer's] lawsuit placed its employees on notice that if an employee files charges with the Board which are deemed by the General Counsel to be nonmeritorious that employee is subjecting himself to the possibility of a devastating lawsuit. In the instant case [employee] Sanford faced the prospect of having to reimburse [the employer] for thousands of dollars in legal expenses if the state court upheld [its] claim. Of even more significance, however, is the fact that Sanford incurred immediate expense by having to retain legal counsel to defend himself against [the employer's] lawsuit. Thus, even if [the employer's] lawsuit is dismissed by the state court, Sanford will have suffered a significant property loss as a direct consequence of his having filed a charge with the Board.

The court of appeals denied enforcement in *Power Systems* because it concluded that the record did not support the Board's finding that the lawsuit had no reasonable basis. The court nevertheless "recognize[d] that civil actions for malicious prosecution carry with them a potential for chilling employee complaints to the Board and the Board may, in a proper case, act to curb such conduct" (601 F.2d at 940). And see *United Credit Bureau of America, Inc.* v. *NLRB*, *supra*, 643 F.2d at 1023-1024; *Angle* v. *NLRB*, *supra*, 683 F.2d at 1300 n.2.[18]

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[18] This Court upheld the Board's conclusion that it is an unfair labor practice for a union to seek court enforcement of fines im-

B. The Board's Conclusion That the Filing of a Civil Suit for the Purpose of Retaliating Against Employees for Exercise of Protected Rights Constitutes an Unfair Labor Practice Reflects an Appropriate Weighing of the Relevant Interests

As we have shown, the Board has been careful to take into account the interests that are relevant to a claim that filing of a civil suit in the context of a labor dispute constitutes an unfair labor practice. On the one hand, the employee and the Board, as the protector of the interests underlying the national labor laws, share an interest in ensuring that employees are not restrained in the exercise of rights guaranteed to them under the National Labor Relations Act. On the other hand, the employer (or union) has an interest in vindicating any rights provided to it under state law, at least to the extent the state law is not preempted by the national labor policy, and the state has an interest in ensuring that its citizens have an opportunity to vindicate such rights.

In balancing these interests, the Board has tended to lean in the direction of preserving opportunities to adjudicate state law issues in state court. Thus, although any filing of a civil suit in this context may be likely to discourage employees from exercising their rights, it is only in rare instances that the Board has concluded that the filing of such a suit constitutes an unfair labor practice. In the class of cases involved here the Board has

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posed on employee-strikebreakers who had resigned from the union before engaging in the activity for which they were fined. See *Booster Lodge No. 405, International Association of Machinists & Aerospace Workers*, 185 N.L.R.B. 380 (1970), enforced, 412 U.S. 84, 85 (1973); *NLRB* v. *Granite State Joint Board, Textile Workers Union, Local 1029*, 409 U.S. 213, 214 (1972). See also *Television Wisconsin, Inc.*, 224 N.L.R.B. 722, 722 n.2 (1976) (union's damage action against employee to enforce unlawful union security provision violated Act); *United Stanford Employees, Local 680*, 232 N.L.R.B. 326, 331 (1977), enforced, 601 F.2d 980 (9th Cir. 1979) (suit against employees to compel union membership, when employees only had a "financial core" obligation, violated Act).

specifically found that the suit was filed for the purpose of retaliation for an employee's exercise of protected rights, often including the filing of charges with the Board, rather than in a good faith effort to vindicate a right conferred by state law. Such retaliatory suits are those most likely to interfere with employees' exercise of rights under the Act, as well as those whose prohibition is least likely to interfere with any significant state interest.

1. ***In Order to Provide Adequate Protection for Employee Rights Under the Act, the Board Must Be Able to Conclude That Filing of a Civil Suit for the Purpose of Retaliation for the Exercise of Protected Rights Constitutes an Unfair Labor Practice***

Filing of a civil suit for purposes of retaliation against employees for engaging in protected activity presents a serious threat to the rights Congress established in the National Labor Relations Act. Of course, any type of retaliation poses a threat to the right to engage in protected activity; however, filing of a retaliatory suit is particularly likely to discourage employees from engaging in such activity. The employees against whom suit is filed are immediately burdened with the time and expense of hiring counsel and defending against the suit. Where, as here, the employer seeks very substantial damages, employees cannot afford not to mount a defense. Moreover, when the employer, like the petitioner here, immediately requests a temporary restraining order, depositions, and a preliminary injunction, the suit can disrupt significantly the lives of the employee-defendants. Since a lawsuit is a matter of public record, other employees are bound to recognize that the result of engaging in protected activity, including pursuit of Board remedies, is involvement in expensive litigation with the possibility of potentially devastating monetary liability.

Of course, litigation is always costly and time-consuming, and its prospect a deterrent. In most cases,

the time and expense are tolerated because individuals must be allowed to pursue their legal remedies. But retaliatory suits are particularly likely to discourage protected activity, since it often will be apparent, from statements made by representatives of the employer or union and from surrounding circumstances, that the suit is tied to the employees' exercise of protected activity. Moreover, retaliatory suits that are brought as a result of an employee's filing of charges with the Board would hamper the Board's processes by deterring employees from filing charges in the future. It is especially important that the Board be able to proscribe such retaliatory suits as an unfair labor practice and impose remedies that will deter them, in order to preserve an atmosphere in which employees are not discouraged from, and punished for, the exercise of protected activity.

Justice Rehnquist has suggested that, "[i]f the application of state tort law interferes with the national objective that employees not be impeded in cooperating with the NLRB in enforcing the NLRA," the employee may appeal that wrongful exercise of state power "through the state system and ultimately to this Court." *United Credit Bureau of America, Inc.* v. *NLRB*, *supra*, 454 U.S. at 999 (Rehnquist, J., dissenting from denial of certiorari). However, such an endeavor requires an expenditure of funds that the employee may be unable or unwilling to incur, and the employee may simply conclude that it is more prudent not to pursue his or her claim with the Board. Even if the employee-defendant perseveres and eventually prevails in the state court action, other employees may well be deterred from engaging in protected activity in the meantime. Thus, although a state court adjudication may result in eventual victory for the employee-defendants, the cost is likely to be great and the interim deterrence significant. Such a chilling of employees' willingness to engage in protected activity and to bring alleged violations of the Act to the Board's attention is exactly what Section 8(a)(1) and (4) was de-

signed to preclude. See *NLRB* v. *Scrivener, supra*, 405 U.S. at 121-125; *Nash* v. *Florida Industrial Commmission*, 389 U.S. 235, 238 (1967). Cf. *Clayton* v. *International Union*, 451 U.S. 679, 693 n.22 (1981) (inconsistent with federal policy to require exhaustion of internal union procedures where to do so "might deplete the employee's energy and resources to the point where he chooses not to pursue his § 301 claim in court"). Moreover, the statutory scheme, which provides for prosecution of unfair labor practice complaints by the General Counsel, contemplates that employees can vindicate their rights under the Act without the expense of hiring private counsel. That purpose is defeated if employees must hire counsel to defend themselves against suits that are meant to discourage their exercise of rights under the Act.[19]

In cases in which a civil suit is clearly retaliatory, the machinery of the state court system simply cannot offer employees the protection that is necessary to preserve their rights under the national labor laws. It is not at all clear that a state court would be in a position to consider a claim that a suit had been filed for the purpose of retaliating for exercise of a federally protected right, nor whether it could provide an appropriate remedy to an employee if it were to entertain such a claim. While a state court is free to decide whether its process has been abused and to grant a remedy for such abuse, that is quite different from determining whether resort to the state court in the circumstances violates federal labor policy. Moreover, it is the province of the Board, rather than of the state courts, to decide whether an unfair labor

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[19] Even if Helton and the other employees were ultimately to prevail on the merits of the libel suit in the state courts, they probably would not receive attorney's fees. Arizona does permit an award of attorney's fees without the maintenance of a subsequent action "upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless or not made in good faith," Ariz. Rev. Stat. Ann. § 12-341.01(C) (West 1982). However, the state court dismissed the counterclaim for abuse of process filed by the employees (Pet. Br. App. D1).

practice has been committed and, if so, to provide an appropriate remedy.

Petitioners urge (Pet. Br. 32) that the Board's ability to obtain temporary injunctive relief that the district court finds to be "just and proper," pursuant to Section 10(j) of the Act, 29 U.S.C. 160(j), is sufficient to protect against "inappropriate employer discovery." See also *United Credit Bureau of America, Inc.* v. *NLRB*, *supra*, 454 U.S. at 999 (Rehnquist, J., dissenting from denial of certiorari) ("If the NLRB concludes that a pending state-court proceeding interferes with its jurisdiction, it may seek an injunction in a federal district court."). However, as shown (pages 24-25, *supra*), it is not only the impact of a retaliatory state suit on the pending Board proceeding, but also the deterrent effect that such a suit would have on the future exercise by employees of their Section 7 right to engage in union or other concerted activity and to file charges with the Board respecting restraint on such activity, that is relevant for purposes of the Act. Accordingly, even if it could not be shown that the state suit specifically interfered with a pending Board proceeding, the Board should nonetheless be entitled to proscribe such a suit because of its likely deterrent effect on the future exercise of Section 7 rights. The Board's authority temporarily to protect its own processes against an immediate interference is not an adequate substitute for its general duty to remedy unfair labor practices.

Moreover, as a practical matter, evaluation of the motive underlying the filing of a civil suit may be more appropriate in the context of an unfair labor practice proceeding than in the context of a proceeding for temporary injunctive relief. There is far more opportunity for careful development of a factual record in a hearing before an administrative law judge than in a summary proceeding in which the Board seeks temporary relief in the early stages of a case. The Board is a specialized agency with expertise in the area of evaluating motives and conduct of parties to a labor dispute; thus, the Board is better equipped than a court to determine

whether filing of a civil suit constitutes a tactic to restrain the exercise of rights protected by the Act (as opposed to the issue of which party would prevail on the merits of the civil suit). A Section 10(j) proceeding may not afford the full relief to employees, including an award of legal expenses incurred in defending a suit brought in bad faith, that would be available from the Board itself. Finally, the finding that an employer or a union has committed an unfair labor practice may well be a more effective deterrent to future unlawful conduct than a preliminary injunction against prosecution of a particular suit.

This case and others like it involve policy considerations similar to those underlying this court's decision in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-240 (1978). In *Robbins* the Court held that under an exemption contained in the Freedom of Information Act, 5 U.S.C. 552(b)(7)(A), the Board properly refused to permit prehearing disclosure of witness statements taken during investigation of an unfair labor practice case. The Court found that the Board's refusal was justified because of the possibility of "witness intimidation" and the chilling effect on willingness of potential witnesses to cooperate in Board investigations. The Court rejected the contention that the possibility of a subsequent Section 8(a)(4) charge would deter employer misconduct in the use of discovered materials, declaring (437 U.S. at 239-240; footnote omitted) that "the possibility of deterrence arising from *post hoc* disciplinary action is no substitute for a prophylactic rule that prevents the harm to a pending enforcement proceeding which flows from a witness having been intimidated." The Court concluded that prehearing disclosure of witnesses' statements would interfere with Board enforcement proceedings by "giving a party litigant earlier and greater access to the Board's case than he would otherwise have" (*id.* at 241).

Analogous considerations apply in cases in which employers file civil suits in retaliation for protected ac-

tivity. Filing and prosecution of a civil suit can result in a chilling effect long before a state court can resolve the case. Moreover, an employer may use the court proceedings for improper purposes. In the present case petitioner used the state court discovery proceedings to question the defendant employees about matters that were relevant only to the unfair labor practice proceedings; in addition, it actually used the information gained from deposing Helton as the basis for questioning an ex-employee about the extent of union organization at the Restaurant. Thus, if an employer may pursue insubstantial litigation in state court in retaliation for an employee's filing of unfair labor practice charges, it could, through the use of state court discovery proceedings, achieve the same deleterious result that the Court sought to avoid in *Robbins*. In order to minimize such chilling effects and thereby protect adequately the rights afforded to employees under the Act, the Board must be able to identify filing of a retaliatory suit as an unfair labor practice and to provide an appropriate remedy.[20]

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[20] *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 253-254 (1939), cited by petitioner (Pet. Br. 21-22), does not stand for the proposition that an employer is privileged to pursue a bad faith suit. In *Fansteel*, the Court rejected the Board's conclusion that the employer unlawfully discharged employees who participated in a sit-down strike that had been enjoined by a state court. There were no allegations that the employer's resort to state court to recover its property was unlawful or that the state court action was pursued for any purpose other than the recovery of the property. Similarly, in *S.E. Nichols Marcy Corp.*, *supra*, also cited by petitioner (Pet. Br. 15), there was no finding that the slander suit, which had been filed by the allegedly slandered supervisors and not by the employer, was filed for any purpose other than to collect the damages sought in the suit.

2. *The Board's Conclusion that the Filing of a Civil Suit for a Retaliatory Purpose Constitutes an Unfair Labor Practice Does Not Interfere in Any Significant Way With the Interest of States in Adjudication of Common Law Tort Claims and Protection of the State Judicial Process From Abuse*

The interest of the states in state court adjudication of a civil suit filed for the purpose of retaliating against employees for the exercise of federally protected rights is minimal. We recognize that state courts traditionally have handled state tort claims and have expertise in this area, and that states have a legitimate interest in affording persons an opportunity to vindicate rights created by state law. But these interests are relevant primarily to suits brought in good faith for the purpose of recovering for injuries suffered as a result of violation of state law. In a case brought, not for the purpose of vindicating rights grounded in state law, but for the purpose of retaliating against employees for their exercise of federally protected rights, the interest in state court adjudication of the merits of the case is quite weak. States can have little genuine interest in ensuring that insubstantial or sham litigation is conducted in their courts. At the same time, as we have shown, the federal interest in preventing the chilling of rights protected by the national labor laws is strong. Thus, considerations of federalism are properly reflected in the distinctions the Board has drawn, which leave normal state court cases brought in good faith to state court adjudication.

While a state court may be concerned to protect state judicial processes from abuse in the form of bad faith or sham lawsuits, that concern is not an adequate substitute for the protection of federal statutory rights from unwarranted interference. An insubstantial state claim filed for the purpose of retaliation for federally protected conduct can constitute an interference with federal rights even if it does not rise to the level of abuse of process under state law.

3. *The Board's Policy with Respect to Retaliatory Civil Suits Is Similar to Principles the Courts Have Applied in Other Areas of the Law*

The rule applied by the Board in the case of a civil suit filed in the context of a labor dispute is similar to legal principles that have been developed in other areas. One example arises in the field of antitrust. In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Court held that the prohibition of Section 1 of the Sherman Act, 15 U.S.C. 1, against unreasonable agreements that restrain trade affecting interstate commerce does not reach private agreements to influence the legislative or executive branch with respect to laws that would have an anticompetitive effect. Accord: *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669-671 (1965). In *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-511 (1972), the Court indicated that the policies underlying *Noerr* likewise shield from the Sherman Act agreements to seek adjudication in courts and administrative agencies as a means of lessening competition. The Court held that the constitutionally protected right to petition "extends to all departments of the Government," and that the "right of access to the courts is indeed but one aspect of the right of petition" (404 U.S. at 510).

However, the Court in both *Noerr* and *California Motor Transport* noted that finding of a Sherman Act violation would be justified in situations in which the conduct ostensibly directed toward influencing governmental action " 'is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor * * *' " (404 U.S. at 511, quoting 365 U.S. at 144). Since the complaint in *California Motor Transport* alleged that the proceedings at issue were instituted "to harass and deter [the competitors] in their use of administrative and judicial proceedings * * *" (404 U.S. at 511), and that they were instituted " 'with or without probable cause, and regardless of the merits

of the cases' " (*id.* at 512, citation omitted), the Court concluded that "such a purpose or intent, if shown, would be 'to discourage and ultimately to prevent the [competitors] from invoking' the processes of the administrative agencies and courts and thus fall within the exception to *Noerr*" (*ibid.*). See also *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 380 (1973) ("the use of administrative or judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims * * * is within the 'mere sham' exception announced in *Noerr*"). And see *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 405 (1978) (allegation of sham and frivolous litigation for the purpose, and with the effect, of delaying construction of a competing power plant); *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96, 110 n.15 (1978) ("Dealers who press sham protests before the * * * Board for the sole purpose of delaying the establishment of competing dealerships may be vulnerable to suits under the federal antitrust laws.").[21]

In sum, under the exception to the *Noerr* doctrine, litigation is not actionable under the antitrust laws

> merely because the plaintiff is trying to get a monopoly. He is entitled to pursue such a goal through

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[21] It is an unsettled question whether a single sham suit would come within the *Noerr* exception. See *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 635 n.6 (plurality opinion), 644 (concurring opinion), 661-662 (1977) (dissenting opinion). And see *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252, 1265-1267 (9th Cir. 1982). See generally Balmer, *Sham Litigation and the Antitrust Laws*, 29 Buffalo L. Rev. 39, 49-56 (1980); Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 108-110 (1977). Even if a single suit could not constitute a violation of the antitrust laws, it would not follow that a single suit could not violate the National Labor Relations Act. A single suit by an employer or union against employees is likely to have a greater chilling effect than a single suit by a company against its competitor. See pages 24-25, *supra*.

> lawful means, including litigation against competitors. The line is crossed when his purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself —regardless of outcome—of litigating.

Grip-Pak, Inc. v. *Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982). And see *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252, 1265-1266 (9th Cir. 1982) (emphasis in original):

> The sham exception * * * reflects a judicial recognition that not all activity that appears as an effort to influence government is actually an exercise of the first amendment right to petition. At times this activity, disguised as petitioning, is simply an effort to interfere directly with a competitor. In that case, the "sham" petitioning activity is not entitled to first amendment protection, *because it is not an exercise of first amendment rights.*

Under both the *Noerr* doctrine and the Board's *Clyde Taylor* policy, the general rule is that resort to the courts is not unlawful. However, under both doctrines, an exception exists for situations in which "the plaintiff wants to hurt [another] not by getting a judgment against him, which would be a proper objective, but just by the maintenance of the suit, regardless of its outcome." *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.*, *supra*, 694 F.2d at 472.

Another analogy to the Board's policy is this Court's recognition of an exception to the judicial policy against federal interference in state court proceedings brought by state officials for proceedings brought in bad faith or "for the purpose of discouraging protected activities." *Dombrowski* v. *Pfister*, 380 U.S. 479, 490 (1965). See also *Younger* v. *Harris*, 401 U.S. 37, 53-54 (1971); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 611 (1975) ("*Younger*, and its civil counterpart * * * do of course allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith * * *.").

A further analogy is presented by the common law tort of abuse of process. See *United Credit Bureau of America, Inc.* v. *NLRB*, *supra*, 643 F.2d at 1024. In such cases, as under the Board policy, "the gist of the tort is * * * misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish." W. Prosser, *Handbook of the Law of Torts* 856 (4th ed. 1971).[22] See also *Restatement (Second) of Torts* § 682 (1977). Thus, in *Alexander* v. *Unification Church of America*, 634 F.2d 673, 678 (2d Cir. 1980), the court held that a complaint stated a claim for abuse of process when it alleged that a damage suit brought by a church against certain persons for deprogramming activities was not actually for the purpose of obtaining damages for church members, but sought to "compel the appellants to cease their deprogramming activities by putting them to the trouble and expense of litigation." That allegation is analogous to the Board's finding in this case, upheld by the court of appeals, that petitioner's suit was not motivated by a desire to collect damages from its employees for the alleged torts, but was intended to deter the employees from filing charges with the Board and engaging in other protected activities.

In each of these areas, the courts have considered carefully the strong interest of litigants in vindicating their rights under state or federal law, as well as the public interest in ensuring that there is ample opportunity for such vindication in the courts of the appropriate jurisdiction. In general, wide latitude is afforded to plaintiffs,

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[22] Prosser notes that in the case of abuse of process (as distinguished from malicious prosecution), it is unnecessary to show that the lawsuit was not meritorious. See also *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.*, *supra*, 694 F.2d at 472. However, Prosser points out that an action for abuse of process requires "a wilful act in the use of process not proper in the regular conduct of the proceeding." W. Prosser, *supra*, at 857. In addition to the filing of the suit itself, petitioner's improper use of the information gained in the depositions of its employees (pages 35-36, *infra*) would constitute a use of process for a purpose other than that for which it was intended.

even when their claims are found to be without merit. But courts have drawn the line at cases that are not brought for the purpose of obtaining the remedy afforded by the law, but rather for the purpose of harassing others or deterring them from protected conduct. In such cases the courts have concluded that the interest in protecting the right to litigate is weak enough that the litigation itself may be found to violate the law. Cf. *Georgia* v. *Rachel*, 384 U.S. 780, 805 (1966) ("It is no answer [in a civil rights removal case] * * * that the defendants might eventually prevail in the state court. The burden of having to defend the prosecutions is itself the denial of a right explicitly conferred by the Civil Rights Act of 1964 * * *.") (footnote omitted). Thus, the Board's policy is in no way an aberration, but is consistent with well-established principles applied in other areas of the law.

C. The Board Properly Concluded in This Case That Petitioner Filed Its Civil Suit for a Retaliatory Purpose and Thereby Committed an Unfair Labor Practice

The Board relied on a number of facts to support its finding that petitioner filed its civil suit for the purpose of retaliation against Helton and the other employees for their exercise of protected rights, rather than for purposes of recovering for alleged libel, mass picketing and business interference. In addition to threats of Restaurant management personnel to get even for the employees' engaging in protected activity (page 4, *supra*), the Board noted that five days after petitioner threatened its employees with reprisals it sued them for half a million dollars. As the court of appeals noted, the suit forced the employees to retain counsel, for, while employees may choose to default in a suit for an injunction against picketing, "[t]hey can hardly fail to defend a claim for $500,000 damages" (Pet. App. A-12 n.3). When Helton, on the day the suit was filed, told Lawrence Katz, the Restaurant's attorney, that he should not be scaring the pickets with the suit, he responded, "[a]ren't you?" (*id.* at A-36). Petitioner not only moved to shorten the time

within which to take depositions and scheduled Helton's deposition for two days after the date of filing of the suit; it questioned her "about the identity of other pro-union employees" (*id.* at A-11)—a matter that had nothing to do with the state court suit. Petitioner then used the information it had gained in the deposition as the basis for interrogating a former waitress about its employees' organizational activity (page 7, *supra*). During the deposition petitioner also "asked numerous questions regarding purported violations of restaurant policies" which, the Board found, was "an obvious maneuver to establish a defense" to the Board's unfair labor practice complaint (Pet. App. A-43).[23] As the court of appeals concluded, "[t]hese circumstances, in the context of other unfair labor practices which the Board found, clearly permit a finding that the lawsuit was prompted by an improper motive" (*id.* at A-12).

In addition to its reliance on the various circumstances surrounding petitioner's filing and prosecution of the civil suit, the Board found that petitioner had shown no reasonable basis for the suit, and concluded that this fact supported the ultimate finding that the suit had been filed for the purpose of retaliation against the employees. The Board did not conduct a trial on the merits of the suit or weigh the available evidence to determine who was likely to prevail on the merits; instead, it gave petitioner an opportunity to produce evidence that would indicate that it had some reason for its suit other than retaliation.

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[23] The court of appeals did not consider whether the taking of the deposition violated Section 8(a)(1), as the Board had found, because it concluded that the filing of the suit alone was a violation (Pet. App. A-11 to A-12 n.2). However, the court did not disturb the Board's finding that the interrogation of the former waitress on the basis of information obtained in the deposition was a violation of Section 8(a)(1) and (4) (Pet. App. A-38). Moreover, the court agreed with the Board (*id.* at A-11 n.2) that the deposition "had a chilling effect on Helton and the other picketers [and] * * * also tended to interfere with the Board's administration of federal labor policy by allowing the restaurant to circumvent the restrictive discovery rules which apply to unfair labor practice hearings."

But petitioner was unable to make this minimal showing. As the court of appeals noted (Pet. App. A-10), petitioner's allegations of mass picketing, trespass, blocking of entrances and danger to the public were "totally unsubstantiated." [24] The court also pointed out that petitioner produced "no evidence" to show that the employees made the statements in the leaflet with reckless disregard for their truth or falsity, which would have been necessary to prove libel in the context of a labor dispute. Moreover, as the Board found, all of the allegations made by the employees in the leaflet were true. See pages 9-10, note 10, *supra*. Thus, the Board was not presented with a close case, but with a complete absence of evidence that petitioner had any reasonable basis for its suit. In those circumstances, and in light of the other evidence of petitioner's retaliatory motive, the Board's determination that the filing of the suit constituted an unfair labor practice was clearly correct.

Petitioner argues that the Board lacked the authority to rely in part on its finding that there was no reasonable basis in fact for petitioner's suit to support its determination that the suit had been brought for the purpose of retaliation.[25] Petitioner appears to concede (Pet. Br. 15) that the Board has authority to proscribe as an unfair labor practice, and restrain, a state court suit "where the object of the litigation was itself unlawful." However, it contends (*ibid.*) that the Board can do so only in cases in which an unlawful objective is apparent from the "declared objective for suit, as stated in the complaint."

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[24] The evidence showed that the picketing was peaceful, involved no more than six or seven adults and two children, took place on the public sidewalk, and did not block access to the Restaurant. See page 9, *supra*. Petitioner never explained how it could reasonably have believed that mass picketing would result from picketing by four waitresses and their immediate families.

[25] Petitioner did not challenge in its petition the Board's finding, upheld by the court of appeals, that its civil suit did not have a reasonable basis in fact. Accordingly, that issue is not before the Court.

Otherwise, petitioner suggests (*id.* at 16), the Board improperly intrudes into areas reserved for resolution by state courts.

It was proper for the Board to look beyond the face of the complaint itself in determining that petitioner's suit lacked a reasonable basis in fact. Otherwise, as the court of appeals observed, "a carefully drawn complaint" could readily be used "to avoid a finding that a lawsuit lacks a reasonable basis" (Pet. App. A-11). Moreover, this Court has made clear that the Board may determine issues that are ordinarily determinable by courts when such determination is necessary to the decision whether an unfair labor practice has been committed. See *NLRB* v. *Strong Roofing & Insulating Co.*, 393 U.S. 357, 360-361 (1969); *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 428 (1967). See also *Angle* v. *NLRB*, *supra*, 683 F.2d at 1300 n.2. The Board's inquiry whether there was a reasonable basis in fact for the filing of a civil suit is not an unusual one; as suggested above, it is the same sort of inquiry that is made in an antitrust case in order to determine whether an earlier state or federal action was filed in an effort to win a favorable judgment or merely to harass defendants. In any event, it hardly constitutes a usurpation of state court functions for the Board to take into account a complete lack of evidentiary foundation in determining that a suit was brought for the purpose of retaliation against employees for their exercise of federally protected rights.

Petitioner also appears to acknowledge (Pet. Br. 13) that the Board could find unlawful and restrain a suit involving a state cause of action that is "based upon or would restrict employee access to the Board." However, it alleges that its suit, unlike those at issue in *Power Systems, Inc.* v. *NLRB*, *supra*, and *United Credit Bureau of America* v. *NLRB*, *supra*, is not "premised on employee resort to NLRB procedures," but rather upon "conduct *unrelated* to Board proceedings and well within the spectrum of situations [e.g., libel and mass picketing] historically recognized by this Court as appropriate for state court resolution" (Pet. Br. 16; emphasis in original).

But the Board found that the filing of petitioner's suit itself was intended to constitute retaliation for the employees' exercise of protected rights, including Helton's filing of an unfair labor practice charge with the Board, regardless of what allegations were contained in the complaint. Thus, there is little reason to differentiate petitioner's suit from those that petitioner agrees could properly be made the subject of an unfair labor practice proceeding. The Board properly concluded that petitioner's filing of the civil suit was intended to discourage, *inter alia*, employee access to the Board and thereby constituted an unfair labor practice.

D. Decisions of This Court Concerning Preemption Do Not Preclude the Board From Finding That Filing of a Civil Suit in Bad Faith Constitutes an Unfair Labor Practice

Petitioner argues that the Board is precluded from finding that bad faith filing of certain types of suits constitutes an unfair labor practice because of several decisions in which the Court concluded that such suits are not preempted by the national labor laws. None of the cases that petitioner cites involved a suit that was alleged to have been filed for the purpose of retaliation for protected conduct. For this and other reasons, they do not govern the issue now before this Court.

1. In *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), the Court held that a civil libel action brought by a supervisor against a union for allegedly false statements contained in a leaflet was not preempted by the national labor laws. However, the Court concluded that, "[i]n order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy," state remedies for libel arising in the context of a labor dispute must be limited to cases in which the plaintiff can show that the statements at issue were made with knowledge of their falsity or with reckless disregard of the truth and resulted in actual injury (*id.* at 64-65). These limi-

tations were designed to ensure that the state law of defamation would not "dampen the ardor of labor debate" by permitting parties to a labor dispute to use libel suits "as weapons of economic coercion" (*id.* at 64). The Court prescribed similar limitations on actions for intentional infliction of emotional distress that arise in a labor context in *Farmer* v. *United Brotherhood of Carpenters & Joiners, Local 25*, 430 U.S. 290, 305-306 (1977).

Petitioner argues that *Linn* and *Carpenters* stand for the proposition that the Board may not interfere with state court actions involving claims of libel and intentional infliction of emotional distress. The two cases do suggest that such claims normally will be filed and adjudicated in state court. But the Court in both cases articulated concerns that are relevant to suits brought in good faith to vindicate the interest underlying the particular state cause of action. The cases do not indicate that the Board could not restrain the prosecution of a suit that it finds to have been brought, not to vindicate such legitimate interests, but for purposes of retaliation for the exercise of federally protected rights. As discussed above, the " 'overriding state interest' " (383 U.S. at 61) in protecting residents from malicious libels is not great in the case of a suit that is brought in bad faith.

The court below did not suggest that the Board would displace state courts in deciding the merits of the state causes of action addressed in *Linn* and *Carpenters*. It held merely that the Board may find that an unfair labor practice has been committed in cases in which the state court claim is not even colorable and is brought in bad faith and in furtherance of an unlawful objective (Pet. App. A-9 to A-11). This is not the same issue that is decided by the state court. As the court of appeals stated (*id.* at A-10), "an employer who brings a good faith action against employees * * * and produces evidence making his claim a colorable one, is not guilty of an unfair labor practice simply because he ultimately loses the lawsuit on the merits." Thus, the Board in this case

ordered petitioner to withdraw its civil suit only because the evidence showed that the suit was brought for the purpose of retaliation. That evidence included (but was not limited to) the complete lack of any showing of a reasonable basis in fact for the claims that were made (*id.* at A-10 to A-11). If the Board concludes that a suit was not brought for the purpose of retaliation, and thus was not an unfair labor practice, the state court could then proceed to determine the merits of the claim, applying the standards set forth in *Linn* or *Carpenters*. But those cases do not suggest that a plaintiff is entitled to have a state court hear and decide a suit that has been filed and prosecuted for a purpose that violates the National Labor Relations Act, or that the Board has no authority to provide a remedy in such a case.[26]

2. Petitioner's reliance (Pet. Br. 12, 19, 21, 29) on *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), is similarly misplaced. In *Sears*, this Court held that the National Labor Relations Act did not preclude a state court from entertaining a trespass claim arising out of union picketing on an employer's premises in a case in which the union had not filed a charge with the Board, so that there was no other forum in which the underlying question of labor law could be adjudicated (*id.* at 185-187, 202, 203 n.34). The Court concluded that state court jurisdiction in such a case would not create an undue risk of interference with the Board's jurisdiction or with protected activity by the union (*id.* at 198, 205). The present case, unlike *Sears*,

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[26] Petitioner's contentions (Pet. Br. 17-18, 23-29) that it is entitled to a jury trial in order to establish its libel claim and that the Board is incapable of providing a remedy for libel are simply irrelevant. The Board did not determine the merits of petitioner's claim, but determined only that it was insubstantial and a sham, because filed merely for the purpose of retaliating against employees for exercising rights protected under the Act, and not to vindicate any right under State law. Since petitioner apparently does not dispute that determination of the Board, it is not clear why it is concerned with the right to a jury trial and availability of a remedy for libel.

arose on petition for review of the Board's order and a cross-application for enforcement of that order. Moreover, the question of preemption that was at issue in *Sears* does not affect the Board's authority in this case, and the Board was not required to conclude that the National Labor Relations Act divested the state court of jurisdiction of the subject matter of petitioner's suit. Rather, the Board found that petitioner's suit constituted unlawful restraint against Helton and the other defendants based upon their exercise of rights protected by the Act, and the Board ordered petitioner to terminate the suit for that reason alone. As the court of appeals observed, the Board had the power to take this action "[w]hether or not the state court's jurisdiction [was] technically preempted" (Pet. App. A-13). Thus, the decision in this case does not depend upon the question of preemption that was at issue in *Sears*.

Even if the *Sears* preemption analysis were applicable, it is fully consistent with the decision below. In *Sears*, the Court recognized (436 U.S. at 202) that "[t]he primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or [to] the NLRB, it must be presented to the Board." The Court concluded, however, that this rationale did not provide a sufficient basis for preempting state court jurisdiction "over arguably protected conduct when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so" (*id.* at 202-203; footnote omitted). Here, the Board's processes were invoked, and it was alleged that petitioner had filed its civil suit in retaliation for protected conduct by its employees; the Board took evidence concerning that allegation and found that petitioner's suit was groundless and was filed solely in retaliation for the protected conduct of the employees. In these circumstances, nothing in *Sears* suggests that petitioner should be free to go forward with a baseless retaliatory suit. Otherwise, the decision

in *Sears*, which rested on a perceived gap in the remedies available under the National Labor Relations Act (436 U.S. at 202), would prevent the Board from affording relief for demonstrated violations of that Act—a result that could hardly have been intended by the Court.

II. SECTION 2283 (28 U.S.C.) DOES NOT PRECLUDE THE BOARD FROM ORDERING PETITIONER TO DISMISS ITS CIVIL SUIT

Section 2283 (28 U.S.C.) provides that a federal court "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment." In *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138 (1971), this Court held that Section 2283 does not bar the Board from obtaining a federal court injunction restraining enforcement of a state court injunction against picketing protected by Section 7 of the National Labor Relations Act. The Court noted (404 U.S. at 146) that the "purpose of § 2283 was to avoid unseemly conflict between the state and the federal courts where the litigants were private persons, not to hamstring the Federal Government and its agencies in the use of federal courts to protect federal rights." Following its decision in *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220 (1957), that the restrictions of Section 2283 do not apply to the United States, the Court concluded that those restrictions were likewise inapplicable to the Board when it acts to vindicate "superior federal interests" (404 U.S. at 146).[27] See also *Mitchum* v. *Foster*, 407 U.S. 225, 235-236 (1972). On two separate occasions since *Nash-Finch* was decided, this Court has upheld Board orders requir-

[27] The Court distinguished *Amalgamated Clothing Workers* v. *Richman Brothers Co.*, 348 U.S. 511 (1955), and *Atlantic Coast Line R.R.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970) (see Pet. Br. 36-37, and *United Credit Bureau of America* v. *NLRB*, *supra*, 454 U.S. at 998 (Rehnquist, J., dissenting from denial of certiorari)), on the ground that in those cases the injunction against state court proceedings was sought by "a *private party*." *NLRB* v. *Nash-Finch Co.*, *supra*, 404 U.S. at 145 n.3 (emphasis in original).

ing unions to cease pursuing civil suits to collect fines imposed in violation of the Act, without even questioning whether such orders might be barred by Section 2283. *Booster Lodge No. 405, International Association of Machinists & Aerospace Workers* v. *NLRB, supra*, 412 U.S. at 85, 87; *NLRB* v. *Granite State Joint Board, Textile Workers Union, Local 1029, supra*, 409 U.S. at 214-215.

Petitioner contends (Pet. Br. 38-39) that *Nash-Finch* is not controlling because there the state court had enjoined picketing that was governed solely by the Act, whereas here the state court had jurisdiction to redress libel and mass picketing. However, the principle on which the *Nash-Finch* holding rests is not limited to a situation in which the state court suit involves an area preempted by federal law. The principle encompasses any situation in which a state court suit threatens to abridge "federal rights" the United States or one of its agencies is entrusted with protecting; in such cases, Section 2283 does not bar the federal government from invoking the aid of a federal court to enjoin the state court proceeding.

This is the very situation in this case. The Board found that petitioner had restrained its employees in the exercise of their rights to file charges with the Board and to engage in other activity protected by Section 7 of the Act, and thereby violated Section 8(a)(1) and (4) of the Act. The Board found that petitioner had accomplished this restraint by filing its state court suit, not for the purpose of recovering for the alleged injury, but in order to retaliate against the employees for engaging in protected activity and to discourage them from the future exercise of protected rights. In these circumstances, the Board, in seeking court of appeals enforcement of its order directing petitioner to withdraw its state court suit,[28] was attempting to vindicate "federal

[28] A Board order is, of course, not self-enforcing. It has compulsive force only after it has been reviewed and enforced by a federal court of appeals.

rights" that the Act had entrusted to its protection. See *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265 (1940) (Board is chosen as "instrument to assure protection from the [conduct described in the Act]"). As the court of appeals noted (Pet. App. A-12), "the Board's power to enforce the provisions of sections 8(a)(1) and 8(a)(4) would be largely crippled if it could not order the withdrawal of a retaliatory lawsuit." [29]

Petitioner further contends (Pet. Br. 39; see also Justice Rehnquist's dissent from denial of certiorari in *United Credit Bureau of America* v. *NLRB*, *supra*, 454 U.S. at 998-999) that here, unlike in *Capital Service, Inc.* v. *NLRB*, 347 U.S. 501 (1954),[30] it could not be found

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[29] Petitioner concedes (Pet. Br. 39 n.31) that, under *Nash-Finch*, "the Board may have authority to restrain state court actions which interfere with its proceedings in violation of Section 8(a)(4) of the Act." However, it contends that, since the Board found that management's threats on the first day of the picketing violated Section 8(a)(1), but not Section 8(a)(4), of the Act (see page 8, *supra*), the court of appeals improperly relied on those threats as evidence that petitioner's motivation in filing its suit was to penalize employees for participating in proceedings before the Board. Even if the threats themselves were only directed to the picketing activity, they could serve as evidence that the subsequent suit was filed for the purpose of retaliation. There is other evidence that supports the Board's finding that the suit was filed to retaliate against Helton for filing charges with the Board and to interfere with the Board's processes. See pages 8-10, 35-37, *supra*. Moreover, Section 2283 would not bar an injunction even if the filing of the state court suit merely constituted a violation of Section 8(a)(1) of the Act, and there is ample evidence to support the Board's Section 8(a)(1) finding (see pages 8-10, 35-37, *supra*).

[30] In *Capital Service*, this Court held that a federal district court properly granted the Board's request to enjoin an employer from enforcing a state court injunction against picketing in a case in which the picketing was also the subject of an unfair labor practice complaint pending before the Board. The Court stated (347 U.S. at 505, quoting 28 U.S.C. 2283) that, since the district court had authority to enjoin the picketing at the Board's request, the district court's order restraining enforcement of the state court injunction

that enjoining the state court proceedings was "necessary in aid of [the Board's] jurisdiction," because "the subject matter of the state lawsuit—libel, trespass, and improper interference with business—was neither pending before the Board nor subject to its jurisdiction" (Pet. Br. 39). However, a finding that the injunction was "necessary in aid of its jurisdiction" (the third exception to the prohibition of Section 2283) would be required only if Section 2283 were applicable to the Board's request for injunctive relief. *Nash-Finch*, decided since *Capital Service*, holds that Section 2283 is inapplicable to such a Board request. In any event, petitioner's argument that the subject matter of the state court suit was neither "pending before the Board nor subject to its jurisdiction" (Pet. Br. 39) is merely a reiteration of its assertion that the Board was precluded from looking behind the state court complaint and considering the totality of the evidence in determining whether filing of the civil suit constituted an unfair labor practice. Since, as part of that determination, the Board had the authority to make at least the threshold inquiry whether petitioner possessed a reasonable basis in fact for its suit, the subject matter of the suit was, of course, "pending before the Board [and] subject to its jurisdiction." [31]

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was " 'necessary in aid of its jurisdiction' and thus permitted under the exceptions specifically allowed by Congress."

[31] Moreover, even if this Court had interpreted Section 2283 to extend to action by federal agencies, there can be little doubt that enforcement of the Board's order would have come within the exception for injunctions "expressly authorized by Act of Congress." Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e), provides for enforcement by the courts of appeals of orders issued by the Board after it has found an unfair labor practice, as it did in this case. See *Mitchum* v. *Foster*, *supra*, 407 U.S. at 233-234 (citing recognition that exception must be made to ban on injunctions against state proceedings "if the import and purpose of other Acts of Congress were to be given their intended scope"); *NLRB* v. *Nash-Finch Co.*, *supra*, 404 U.S. at 152-153 (White, J., dissenting) (citing powers of Board and courts to issue injunctions in connection with enforcement of Board orders after unfair labor

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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practices have been adjudicated by the Board). Unlike the present case, none of the cases cited by petitioner involved enforcement of a Board order following a Board finding that filing of a state court action constituted an unfair labor practice in violation of the National Labor Relations Act.

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